

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

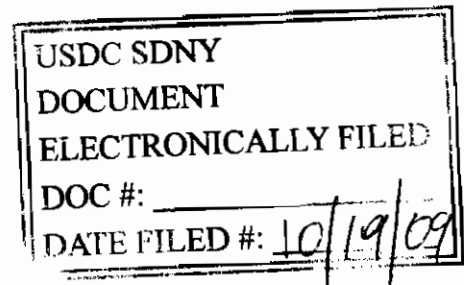
-against-

S10 98 Crim. 1023 (LAK)

AHMED KHALFAN GHAILANI,

Defendant.
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ORDER



LEWIS A. KAPLAN, *District Judge.*

The defendant stands indicted for multiple felonies in connection with the 1998 bombings of the United States Embassies in Nyrobi, Kenya, and Dar-Es-Salaam, Tanzania, in which more than 200 people were killed. The matter now is before the Court on the government's *ex parte* motion for a protective order, pursuant to Section 4 of the Classified Information Procedures Act ("CIPA"), 18 U.S.A. App. 3 § 4, and Rule 16(d)(1) of the Federal Rules of Criminal Procedure, regarding disclosure of certain classified information in the possession and control of the Central Intelligence Agency.

The information in question all is classified within the meaning of CIPA and falls into three categories ("Categories I, II and III") that are described in a sealed supplement to this order (the "Supplement"). The government concedes that the documents in Categories I and II contain information to which the defense is entitled under Fed. R. Crim. P. 16. It nevertheless maintains, in view of the sensitivity of the information, that the Category I and II materials should be produced only in redacted form and, in some particulars, in a manner that summarizes rather than contains the

precise information in the originals. The government asserts that the Category III documents themselves are not discoverable under Rule 16 but concedes that the fact of their existence may be discoverable. It argues, therefore, that Category III materials should be produced only in the form of a summary chart (the "Chart") without the underlying documents.

The Court has reviewed all of the Category I and II documents in their entirety and in the form in which the government proposes to produce them as well as the Chart. It has not yet completed its review of the Category III materials underlying the Chart. In the interest of commencing promptly the production to the defense of discoverable material, this order resolves the government's motion in major part but reserves decision as to the balance pending the completion of its review of the Category III materials underlying the Chart.

The Court hereby finds as follows:

1. All of the information that is the subject of the government's motion, which is more particularly described in the Supplement, constitutes "classified information" within the meaning of Section 1 of CIPA. Further, the government has properly invoked its state-secrets privilege with respect to the documents in all three categories. The privilege has been lodged by the head of the relevant government agency in a sworn affidavit, and the information's disclosure to the public reasonably could be expected to cause damage to the national security of the United States.
2. With the exceptions noted in the Supplement, the production of the Category I and II documents and the Chart, in the redacted and partially summarized form proposed by the government, appears adequately to serve the defendant's interest in obtaining material discoverable under Rule 16. The

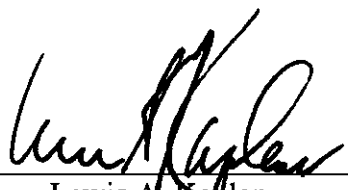
documents in Categories I and II are discoverable under Rule 16. Except as identified in the Supplement, the proposed redactions and summaries do not deprive the defendant of information that is material or helpful to the defense. The Court reserves decision as to the producibility of the Category III documents underlying the summary chart.

Accordingly, the government's motion for a protective order is granted to the extent that the government may comply with its Rule 16 obligations with respect to the Category I and II documents and the Chart by producing those documents to cleared defense counsel in the redacted and partially summarized form submitted to the Court with the exceptions noted in the Supplement. The government shall produce to the defense the Category I and II documents and the Chart in the manner proposed, as modified by the Supplement. The government's motion and supporting papers shall remain preserved in the custody of the Court Security Officer in accordance with established procedures, until further order of this Court.

This ruling is without prejudice to any application by the defense for discovery of the redacted and summarized material following its review of the documents produced by the government pursuant to this order.

SO ORDERED.

Dated: October 19, 2009



Lewis A. Kaplan
United States District Judge